July 2006

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Insert the following text after the April 2005 update to page 112:

Whether hearsay evidence constitutes a "testimonial statement" barred from admission against a defendant where the defendant has not had an opportunity to cross-examine the declarant requires a court to conduct an objective examination of the circumstances under which the statement was obtained. *Davis v Washington*, 547 US ___, ___ (2006). Although the United States Supreme Court did not "produce an exhaustive classification of all conceivable statements . . . as either testimonial or nontestimonial," the Court expressly stated:

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis, supra* at ___ (footnote omitted).

Davis involved two separate cases (*Davis v Washington* and *Hammon v Indiana*) in which the defendant assaulted a victim, the victim answered questions posed by law enforcement personnel, the victim did not testify at trial, and the victim's statement was admitted as evidence against the

defendant. In one of these cases, *Davis v Washington*, the statements at issue arose from the victim's (McCottry) conversation with a 911 operator during the assault. After objectively considering the circumstances under which the 911 operator "interrogated" McCottry, the Court concluded that the 911 tape on which the victim identified the defendant as her assailant and gave the operator additional information about the defendant was not testimonial evidence barred from admission by the Confrontation Clause. According to the Court:

> "[T]he circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*." *Davis, supra* at ___ (emphasis in original).

In the other case, *Hammon v Indiana*, the statement at issue arose from answers the victim (Amy) gave to one of the police officers who responded to a "reported domestic disturbance" call at the victim's home. Amy summarized her responses in a written statement and swore to the truth of the statement. In this case, the Court concluded that the circumstances surrounding Amy's interrogation closely resembled the circumstances in *Crawford v Washington*, 541 US 36 (2004), and that the "battery affidavit" containing Amy's statement was testimonial evidence not admissible against the defendant absent the defendant's opportunity to cross-examine the victim. The Court summarized the similarities between the instant case and *Crawford*:

> "Both declarants were actively separated from the defendant—officers forcibly prevented [the defendant in Amy's assault] from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial." *Davis (Hammon), supra* at ___ (emphasis in original).

CHAPTER 2
Evidence

Part IV—Hearsay (MRE Article VIII)

2.41 Statement of Co-Defendant or Co-Conspirator

A. Statement Made in Furtherance of Conspiracy

Foundation Requirements.

Insert the following case summary before the last paragraph on page 114:

Where a preponderance of the evidence has established an ongoing conspiracy, a co-conspirator's statement concerning a factor necessary to the continuance of the illegal conduct constitutes a statement made "in furtherance of the conspiracy." *People v Martin*, ___ Mich App ___, ___ (2006). In *Martin,* the defendant and his brother were charged with crimes arising out of their participation in the operation of an adult entertainment establishment. The charges arose out of the alleged performance of sex acts in a private VIP section of the establishment. *Id*. At trial, Angela Martin, the ex-wife of the defendant's brother, testified about certain statements she heard her ex-husband make, including his admission that sex acts were occurring at the establishment and that he and the other participants financially benefitted from the illegal activities. *Id*. Angela further testified that she overheard a telephone conversation between the defendant and her ex-husband regarding "the VIP cards necessary to access the downstairs area where acts of prostitution occurred." *Id*. The defendant was convicted, and on appeal argued that Angela's testimony regarding his brother's statements was inadmissible hearsay. *Id*.

The Court of Appeals noted that trial testimony given before Angela's testimony provided evidence sufficient to raise an inference that the defendant and his brother conspired to carry out the illegal objectives of maintaining the establishment as a house of prostitution, accepting earnings of prostitutes, and engaging in a pattern of racketeering activity. *Martin, supra* at ___. The Court further noted that the statements made by the defendant's brother and about which Angela testified were clearly made during the existence of the conspiracy and that because the conversation about the use of VIP cards clearly concerned the activities covered by the conspiracy, the statements were made in furtherance of the conspiracy. *Id*. Statements made to Angela regarding the financial compensation her ex-husband and defendant earned from the establishment were also made in furtherance of the conspiracy because the statements informed Angela of her collective stake in the success of the conspiracy and served to foster the trust and cohesiveness necessary to

keep Angela from interfering with the continued activities of the conspiracy. *Id*. Because the statements about which Angela testified were "statement[s] by a coconspirator... during the course and in furtherance of the conspiracy on independent proof of the conspiracy," the statements were properly admitted against the defendant at trial. *Id*.

B. Inculpatory Statements

Insert the following case summary after the first paragraph on page 115:

**Bruton v United States*, 391 US 123 (1968)

A *Bruton** error is an error of constitutional magnitude subject to harmless error analysis; it does not require automatic reversal of a defendant's conviction. *People v Pipes*, ___ Mich ___, ___ (2006). Where a *Bruton* error is unpreserved, it is subject to review for "plain error that affected substantial rights." *Id*. at ___, quoting *People v Carines*, 460 Mich 750, 774 (1999). Under this standard, even where a codefendant's statement was improperly admitted at a joint trial, the other codefendant's statement may be considered to determine whether the error was harmless. *Id*. at ___.

In *Pipes*, the two defendants sought separate trials or separate juries based on their contention that their defenses were mutually exclusive. *Pipes, supra* at ___. To support their assertion that their defenses were mutually exclusive, both defendants made offers of proof and promised to testify at trial. *Id*. at ___. The trial court disagreed that the defendants' defenses were mutually exclusive and denied the motions for severance. *Id*. at ___. The court repeatedly indicated that no *Bruton* error would arise when the defendants' statements to police were admitted at trial because both defendants were going to testify. *Id*. at ___. According to the court, the defendants' statements to police were admissible in a joint trial because the codefendant who made the statement would be subject to cross-examination when he testified at trial. *Id*.

Multiple statements were admitted at the joint trial and both defendants decided not to testify—a clear *Bruton* error in violation of the defendants' Sixth Amendment right of confrontation. *Pipes, supra* at ___. Neither defendant objected and both defendants were convicted. *Id*. at ___. The Court of Appeals reversed on the basis of the *Bruton* error and its effect on the defendants' right to a fair trial. *Id*. at ___.

The Michigan Supreme Court reversed, noting that the Court of Appeals failed to identify whether the *Bruton* error was preserved or unpreserved and improperly reviewed the case under a harmless error analysis. *Pipes, supra* at ___. The proper standard of review in this case is the plain error analysis. According to the Court:

> "Because each defendant's own statements were self-incriminating, we cannot conclude that either defendant was

prejudiced to the point that reversal is required by the erroneous admission of his codefendant's incriminating statements. Each defendant individually admitted the territorial dispute with rival drug dealers, and each defendant's statements exposed the motive behind the homicidal shooting–retaliation for shooting the green Jeep Cherokee. In his second statement to the police, defendant Key explicitly admitted being the triggerman in the drive-by shooting and using an AK-47 rifle. Although Pipes did not confess to being the gunman, he admitted procuring a vehicle to transport defendant Key to the drive-by shooting and admitted following Key in the Jeep in order to 'watch [Key's] back.' Taken in isolation, these statements provide more than enough 'damaging evidence,' if believed by a jury, for the jury to find each defendant guilty beyond a reasonable doubt as a principal or as an aider or abettor of first-degree premeditated murder." *Id*. at ___ (footnote omitted).

CHAPTER 3

Civil Proceedings

Part VII—Rules Governing Particular Types of Actions (Including MCR Subchapters 3.300–3.600)

3.60 Arbitration

D. Judicial Review and Enforcement

Effective June 15, 2006, MCR 3.602 (I)–(N) were reinstated. Delete the May 2006 update to page 251. The last two paragraphs on page 251 should read as follows:

MCR 3.602 governs statutory arbitration under MCL 600.5001 through MCL 600.5035. A statutory arbitration award may be confirmed, modified, corrected, or vacated. "A reviewing court has three options when a party challenges an arbitration award: (1) confirm the award, (2) vacate the award if obtained through fraud, duress, or other undue means, or (3) modify the award or correct errors that are apparent on the face of the award." *Krist v Krist*, 246 Mich App 59, 67 (2001). MCR 3.602(I) governs the confirmation of an award. Although MCR 3.602(J)(3) provides the trial court may order a rehearing, the rule does not provide that the trial court may return the case to an arbitrator for reconsideration. Nor may the court return the matter to the arbitrator for an expansion of the record. *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 558 (2004).

An arbitration award may be vacated if (1) the award was procured by corruption, fraud, or other undue means; (2) there was evident partiality by an arbitrator, or misconduct prejudicing a party's rights; (3) the arbitrator exceeded granted powers; or (4) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights. MCR 3.602(J)(1). *Dohanyos v Detrex Corp*, 217 Mich App 171, 174–175 (1996); *Collins v Blue Cross and Blue Shield of Michigan*, 228 Mich App 560, 567 (1998).

CHAPTER 3

Civil Proceedings

Part VII—Rules Governing Particular Types of Actions (Including MCR Subchapters 3.300–3.600)

3.60 Arbitration

E. Timing

Effective June 15, 2006, MCR 3.602 (I)–(N) were reinstated. Delete the May 2006 update to page 252. The text in subsection (E) should read as follows:

The award must be confirmed within one year after the award is rendered. MCL 600.5021; MCR 3.602(I).

Attacks on the award must be brought within 21 days from delivery of a copy of the award to the applicant. If the attack is based on fraud, corruption or undue means, the attack must be brought within 21 days after such grounds are known or should have been known. MCR 3.602(J), (K).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.11 Motion to Suppress Defendant's Statement

B. Foundation

Insert the following text after the last paragraph on page 298:

When the corpus delicti of the underlying crime is established, admission of a defendant's confession to being an accessory after the fact requires no independent evidence showing that the principal was assisted after committing the crime; "[T]he corpus delicti of accessory after the fact is the same as the corpus delicti of the underlying crime itself." *People v King*, ___ Mich App ___, ___ (2006).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.14 Double Jeopardy

B. Multiple Prosecutions for the Same Offense

Add the following text to the March 2005 update to page 316:

> **Note:** In *People v Joezell Williams*, ___ Mich ___ (2006), the Michigan Supreme Court affirmed the Court of Appeals decision in *People v [Joezell] Williams II*, 265 Mich App 68 (2005), the case discussed in the March 2005 update to page 316, but the Supreme Court declined the Court of Appeals' request to modify the decision in *People v Bigelow*, 229 Mich App 218 (1998).

Where a conviction is predicated on conviction of an underlying felony and double jeopardy concerns mandate that the underlying felony conviction be vacated, an appellate court may reinstate the underlying felony conviction if the greater conviction is reversed on grounds affecting only the greater offense. *People v Joezell Williams*, ___ Mich ___, ___ (2006) (if defendant's felony-murder conviction was later reversed on grounds affecting only the elements necessary to murder, an appellate court could reinstate the conviction for the underlying offense that had been vacated for double jeopardy reasons).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.19 Speedy Trial

C. Untried Charges Against State Prisoners—180-Day Rule

Replace the first two paragraphs after the numbered list on page 330 with the following text:

*Overruled to the extent of its inconsistency with MCL 780.131.

In *People v Cleveland Williams*, ___ Mich ___, ___ (2006), the Michigan Supreme Court, contrary to *People v Smith*, 438 Mich 715 (1991),* ruled that MCL 780.131 "contains no exception for charges subject to consecutive sentencing." Consequently, unless specifically excepted under MCL 780.131(2), the 180-day rule applies to *any* untried charge against *any* prisoner, without regard to potential penalty. According to the Court, the plain language of MCL 780.131 permits a prisoner subject to mandatory consecutive sentencing to assert his right to a speedy trial. However, that the defendant in this case was entitled to raise the speedy trial issue did not end the Court's review of this case. After concluding that the defendant raised a valid claim under MCL 780.131, the Court considered the delay in bringing the defendant to trial and determined that the defendant's speedy trial rights had not been violated. *Cleveland Williams, supra* at ___.

*_Hill_ and _Castelli_ were overruled to the extent of their inconsistency with MCL 780.131.

In addition to the defendant's speedy trial claim, the Court addressed specific case law that incorrectly interpreted the statutory language governing the notice required to trigger application of the statute. Contrary to *People v Hill*, 402 Mich 272 (1978), and *People v Castelli*, 370 Mich 147 (1963),* the Court noted that the statutory time period of 180 days begins to run when the prosecution receives notice from the Department of Corrections:

> "The statutory trigger is notice to the prosecutor of the defendant's incarceration and a departmental request for final disposition of the pending charges. The statute does not trigger the running of the 180-day period when the Department of Corrections actually learns, much less should have learned, that criminal charges were pending against an incarcerated defendant." *Cleveland Williams, supra* at ___.

A community corrections center is a state correctional facility for purposes of the exception in MCL 780.131(2)(a). *People v McCullum*, 201 Mich App 463, 465–466 (1993).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

D. Where Did the Search Take Place?

7. Searches of Parolees or Probationers

Insert the following text after the existing paragraph on page 338:

A suspicionless search or seizure conducted solely on the basis of an individual's status as a probationer or parolee does not violate the Fourth Amendment's protection against unreasonable searches and seizures. *Samson v California*, 547 US ___, ___ (2006). The *Samson* case involved a California statute* authorizing law enforcement officers to search a parolee—without a warrant and without suspicion of criminal conduct—solely on the basis of the person's status as a parolee.

*Michigan law authorizes a police officer to arrest without a warrant any probationer or parolee if the officer has reasonable cause to believe the person has violated a condition of probation or parole. MCL 764.15(1)(h).

The question to be decided by the *Samson* Court was "[w]hether a condition of [a parolee's] release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment." *Samson, supra* at ___ (footnote omitted). The Court concluded that under the totality of the circumstances and in light of the legitimate government interests furthered by monitoring parolee activity, the suspicionless search of a parolee does not impermissibly intrude on the parolee's already diminished expectation of privacy. *Id*. at ___.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

E. Was a Warrant Required?

1. "Exigent Circumstances," "Emergency Doctrine," or "Hot Pursuit"

Insert the following text after the partial paragraph at the top of page 340:

A police officer's warrantless entry into a defendant's home may be justified under the exigent circumstances doctrine when the officer is responding to a home security alarm and the officer's decision to enter the premises is reasonable under the totality of the circumstances. *United States v Brown*, ___ F3d ___, ___ (CA 6, 2006). According to the *Brown* Court:

> "In this case, [the officer] responded to a burglar alarm that he knew had been triggered twice in a relatively short period of time and arrived within just a few minutes of the first activation. He was not met by a resident of the house, but by the neighbor who directed him to the basement door. The sounding alarm, the lack of response from the house, and the absence of a car in the driveway made it less likely that this was an accidental activation. Investigating, [the officer] found the front door secured but the basement door in the back standing ajar. While [the officer] did not find a broken window or pry marks on the open door, it was objectively reasonable for him to believe that this was not a false alarm but, rather, that the system had recently been triggered by unauthorized entry through the open basement door. These circumstances, including the recently activated basement door alarm and evidence of a possible home invasion through that same door, establish probable cause to believe a burglary was in progress and justified the warrantless entry into the basement." *Id*. at ___.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.23 Dwelling Searches

C. Factors Involved in Dwelling Searches

1. Knock and Announce

Insert the following text before sub-subsection (2) on page 353:

When law enforcement officers violate the knock-and-announce rule before executing a search warrant, exclusion of any evidence seized is not the proper remedy. *Hudson v Michigan*, 547 US ___, ___ (2006).

The *Hudson* Court restated the three interests protected by the common-law knock-and-announce rule. First, compliance with the knock-and-announce rule protects the safety of the resident and the law enforcement officer because it minimizes the number of situations when "an unannounced entry may provoke violence in supposed self-defense by the surprised resident." Secondly, when law enforcement officers delay entry by knocking and announcing their presence, a resident is given the opportunity to cooperate with the officers "and to avoid the destruction of property occasioned by a forcible entry." Finally, when officers avoid a sudden entry into a resident's home, it protects a resident's dignity and privacy by affording the resident an opportunity "to collect oneself before answering the door." The Court found none of those interests present in this case:

> "What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable." *Hudson*, *supra* at ___ (emphasis in original).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.25 Search Warrants

D. Description

Insert the following text on page 359 before the last paragraph in this section:

In *People v Martin*, ___ Mich App ___, ___ (2006), the Court of Appeals cited *People v Zuccarini*, 172 Mich App 11 (1988), discussed above, in support of its ruling that warrants obtained to search several structures for evidence of prostitution and drug trafficking described with sufficient particularity the items to be seized. According to the *Martin* Court:

> "[T]he descriptions of the items to be seized from these three locations was sufficiently particularized. The search warrants authorized the search for equipment or written documentation used in the reproduction or storage of the activities and day-to-day operations of the bar. This sentence is further qualified by the reference to the drug trafficking and prostitution activities that were thought to take place there. See *Zuccarini*, *supra* at 16 (noting that a reference to the illegal activities may constitute a sufficient limitation on the discretion of the searching officers). Thus, examining the description in a commonsense and realistic manner, it is clear that the officers' discretion was limited to searching for the identified classes of items that were connected to drug trafficking and prostitution activities at Legg's Lounge. *Id.* Hence, the search warrant provided reasonable guidance to the officers performing the search. [*People v*]*Fetterley*, [229 Mich App 511], 543 [(1998)]. Therefore, the search warrants met the particularity requirement." *Martin, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part III—Discovery and Required Notices (MCR Subchapter 6.200)

4.26 Discovery

B. Scope of Discovery

Insert the following text after the first full paragraph on page 363:

A *Brady** violation may result from a failure to disclose exculpatory evidence to the defendant, even when the evidence was made known only to a law enforcement officer and not to the prosecutor. *Youngblood v West Virginia*, 547 US ___, ___ (2006). In *Youngblood*, a case in which a potentially exculpatory note written by two victims of the crime was not disclosed to the defendant, the United States Supreme Court remanded the case to the West Virginia Supreme Court of Appeals for that court's "view" of the *Brady* issue raised by the defendant in his motion to set aside the verdict. The Court did not decide the issue; instead, the Court declined to review the merits of the case without first having the West Virginia court consider the *Brady* issue. *Youngblood*, *supra* at ___.

**Brady v Maryland*, 373 US 83 (1962).

CHAPTER 4

Criminal Proceedings

Part III—Discovery and Required Notices (MCR Subchapter 6.200)

4.30 Witnesses—Disclosure and Production

F. Unavailable Witnesses

Insert the following text on page 383 after the first paragraph in this subsection:

Whether hearsay evidence constitutes a "testimonial statement" barred from admission against a defendant where the defendant has not had an opportunity to cross-examine the declarant requires a court to conduct an objective examination of the circumstances under which the statement was obtained. *Davis v Washington*, 547 US ___, ___ (2006). Although the United States Supreme Court did not "produce an exhaustive classification of all conceivable statements . . . as either testimonial or nontestimonial," the Court expressly stated:

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis, supra* at ___ (footnote omitted).

Davis involved two separate cases (*Davis v Washington* and *Hammon v Indiana*) in which a defendant assaulted a victim, the victim answered questions posed by law enforcement personnel, the victim did not testify at trial, and the victim's statement was admitted as evidence against the defendant. In one of the cases, *Davis v Washington*, the statements at issue arose from the victim's (McCottry) conversation with a 911 operator during the assault. After objectively considering the circumstances under which the 911 operator "interrogated" McCottry, the Court concluded that the 911 tape, on which McCottry identified the defendant as her assailant and gave the operator additional information about the defendant, was not testimonial evidence barred from admission by the Confrontation Clause. According to the Court:

> "[T]he circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*." *Davis, supra* at ___ (emphasis in original).

In the other case, *Hammon v Indiana*, the statement at issue arose from answers the victim (Amy) gave to one of the police officers who responded to a "reported domestic disturbance" call at the victim's home. Amy summarized her responses in a written statement and swore to the truth of the statement. In this case, the Court concluded that the circumstances surrounding Amy's interrogation closely resembled the circumstances in *Crawford v Washington*, 541 US 36 (2004), and that the "battery affidavit" containing Amy's statement was testimonial evidence not admissible against the defendant absent the defendant's opportunity to cross-examine the victim. The Court summarized the similarities between the instant case and *Crawford*:

> "Both declarants were actively separated from the defendant—officers forcibly prevented [the defendant in Amy's assault] from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial." *Davis (Hammon), supra* at ___ (emphasis in original).

CHAPTER 4

Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.41 Confrontation

A. Defendant's Right of Confrontation

4. Unavailable Witness

Insert the following text after the first paragraph at the top of page 415:

Whether hearsay evidence constitutes a "testimonial statement" barred from admission against a defendant where the declarant is unavailable and the defendant has not had an opportunity to cross-examine the declarant requires a court to conduct an objective examination of the circumstances under which the statement was obtained. *Davis v Washington*, 547 US ___, ___ (2006).

5. Codefendant or Co-Conspirator Testimony

Insert the following text on page 415 after the second paragraph in this sub-subsection:

**Bruton v United States*, 391 US 123 (1968).

Even where the admission of a codefendant's statement at a joint trial violated *Bruton*,* the other codefendant's statement may be considered to determine whether the error was harmless. A *Bruton* error is an error of constitutional magnitude subject to harmless error analysis; it does not require automatic reversal of a defendant's conviction. *People v Pipes*, ___ Mich ___, ___ (2006).

In *Pipes*, the two defendants sought separate trials or separate juries based on their contention that their defenses were mutually exclusive. *Pipes*, *supra* at ___. To support their assertion that their defenses were mutually exclusive, both defendants made offers of proof and promised to testify at trial. *Id*. The trial court disagreed and denied the motions for severance. *Id*. The court repeatedly indicated that no *Bruton* error would arise when the defendants' statements to police were admitted at trial because both defendants were going to testify. *Id*. According to the court, the defendants' statements to police were admissible in a joint trial because the codefendant who made the statement would be subject to cross-examination when he testified at trial. *Id*.

Multiple statements were admitted at the joint trial and both defendants decided not to testify—a clear *Bruton* error in violation of the defendants'

Sixth Amendment right of confrontation. *Pipes, supra* at ___. Neither defendant objected and both defendants were convicted. *Id*. The Court of Appeals reversed on the basis of the *Bruton* error and its effect on the defendants' right to a fair trial. *Id*.

The Michigan Supreme Court reversed, noting that the Court of Appeals failed to identify whether the *Bruton* error was preserved or unpreserved and improperly reviewed the case under a harmless error analysis. *Pipes, supra* at ___. The proper standard of review in this case is the plain error analysis. According to the Court:

> "Because each defendant's own statements were self-incriminating, we cannot conclude that either defendant was prejudiced to the point that reversal is required by the erroneous admission of his codefendant's incriminating statements. Each defendant individually admitted the territorial dispute with rival drug dealers, and each defendant's statements exposed the motive behind the homicidal shooting – retaliation for shooting the green Jeep Cherokee. In his second statement to the police, defendant Key explicitly admitted being the triggerman in the drive-by shooting and using an AK-47 rifle. Although Pipes did not confess to being the gunman, he admitted procuring a vehicle to transport defendant Key to the drive-by shooting and admitted following Key in the Jeep in order to 'watch [Key's] back.' Taken in isolation these statements provide more than enough 'damaging evidence.' if believed by a jury, for the jury to find each defendant guilty beyond a reasonable doubt as a principal or an aider or abettor of first-degree premeditated murder." *Id*.

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.41 Confrontation

C. Standard of Review

Insert the following text before Section 4.42 near the middle of page 416:

**Bruton v United States*, 391 US 123 (1968).

A *Bruton** error is an error of constitutional magnitude subject to harmless error analysis; it does not require automatic reversal of a defendant's conviction. *People v Pipes*, ___ Mich ___, ___ (2006). Where a *Bruton* error is unpreserved, it is subject to review for "plain error that affected substantial rights." *Id.*, quoting *People v Carines*, 460 Mich 750, 774 (1999). Under this standard, even where a codefendant's statement was improperly admitted at a joint trial, the other codefendant's statement may be considered to determine whether it was harmless. *Pipes, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

B. Sentencing Guidelines

Insert the following text on page 449 after the first paragraph in this subsection:

A trial court may properly consider information not proved beyond a reasonable doubt when scoring offense variables on which a defendant's sentence is based. *People v Drohan*, 475 Mich ___, ___ (2006). In *Drohan*, the Court reaffirmed its assertion in *People v Claypool*, 470 Mich 715, 730 n 14 (2004), that Michigan's sentencing scheme does not violate a defendant's Sixth Amendment right to be sentenced on the basis of facts determined by a jury beyond a reasonable doubt. *Drohan, supra* at ___. The *Drohan* Court's decision expressly states that *Blakely v Washington*, 542 US 296 (2004), *United States v Booker*, 543 US 220 (2005), and other post-*Blakely* cases do not apply to Michigan's indeterminate sentencing scheme. *Drohan, supra* at ___. According to the *Drohan* Court, Michigan's sentencing guidelines are not unconstitutional because trial courts do not use judicially ascertained facts to impose a sentence greater than the term authorized by the jury's verdict—the statutory maximum. *Id*. at ___. The Court explained, "a defendant does not have a right to anything less than the maximum sentence authorized by the jury's verdict, and, therefore, judges may make certain factual findings to select a specific minimum sentence from within a defined range." *Id*. at ___ (citations omitted).

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

B. Sentencing Guidelines

Insert the following text after the July 2005 update to page 450:

See also *People v Church*, ___ Mich ___ (2006), a Michigan Supreme Court order vacating the defendant's sentences, reiterating the Court's holding in *People v Hendrick*, 472 Mich 555, 560 (2005), and remanding the case to the trial court for resentencing. The order, in part, stated the following:

> "The sentencing guidelines apply to sentences imposed after probation revocation. *People v Hendrick*, 472 Mich 555, 560 (2005). Defendant's minimum sentencing guidelines range is 7 to 23 months. The trial court did not articulate substantial and compelling reasons for imposing a minimum sentence of 40 months. On remand, the trial court shall sentence defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003). Under *Hendrick*, *supra* at 564, the acts giving rise to the probation violation may provide a substantial and compelling reason to depart." *Church*, *supra* at ___.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.56 Sentencing—Deferred, Delayed, and Diversionary

B. Holmes Youthful Trainee Act (HYTA)

Insert the following text before sub-subsection (1) at the bottom of page 458:

See *People v Giovannini*, ___ Mich App ___, ___ (2006), where the Court of Appeals held that a "defendant was not ineligible for sentencing under the [youthful trainee act] solely because he was convicted of two criminal offenses." The Court explained: "Interpreting MCL 762.11 to permit placement under the [youthful trainee act] only in cases involving a single offense would work contrary to the discretion invested in the trial court and to the overall purpose of the act." *Giovannini*, *supra* at ___.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.60 Probation Violation

E. Sentencing

Insert the following text after the July 2005 update to page 469:

See also *People v Church*, ___ Mich ___ (2006), a Michigan Supreme Court order vacating the defendant's sentences, reiterating the Court's holding in *People v Hendrick*, 472 Mich 555, 560 (2005), and remanding the case to the trial court for resentencing. The order, in part, stated the following:

> "The sentencing guidelines apply to sentences imposed after probation revocation. *People v Hendrick*, 472 Mich 555, 560 (2005). Defendant's minimum sentencing guidelines range is 7 to 23 months. The trial court did not articulate substantial and compelling reasons for imposing a minimum sentence of 40 months. On remand, the trial court shall sentence defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003). Under *Hendrick*, *supra* at 564, the acts giving rise to the probation violation may provide a substantial and compelling reason to depart." *Church*, *supra* at ___.

CHAPTER 4

Criminal Proceedings

Part VII—Rules Governing Particular Types of Offenses

4.63 Aiding and Abetting

B. Elements

Insert the following text after the partial paragraph at the top of page 474:

However, "evidence of a shared specific intent to commit the crime of an accomplice is [not] the exclusive way to establish liability under [Michigan's] aiding and abetting statute." *People v Robinson*, ___ Mich ___, ___ (2006). The *Robinson* Court explained that the Legislature's abolition of the common-law distinction between principals and accessories did not eliminate the common-law theory of an accomplice's liability for the probable consequences of the crime committed. Therefore, a defendant who intends to aid and abet the commission of a crime is liable for that crime and for "the natural and probable consequences of that crime." *Id*. at ___.

In *Robinson*, the defendant was properly convicted of second-degree murder when the victim of an assault died as a result of injuries inflicted by the defendant's accomplice even where the defendant said "that's enough" and walked away from his accomplice and the victim before the victim was shot. *Id*. at ___. Evidence showed that the defendant drove his accomplice to the victim's home and intended to participate with his accomplice in assaulting the victim. Said the *Robinson* Court:

> "In our judgment, a natural and probable consequence of a plan to assault someone is that one of the actors may well escalate the assault into a murder." *Id*. at ___.

CHAPTER 4

Criminal Proceedings

Part VII—Rules Governing Particular Types of Offenses

4.65 Conspiracy

B. Elements

3. Statements of a Co-Conspirator

Insert the following text immediately before subsection (C) on page 477:

Where a preponderance of the evidence has established an ongoing conspiracy, a co-conspirator's statement concerning a factor necessary to the continuance of the illegal conduct constitutes a statement made "in furtherance of the conspiracy." *People v Martin*, ___ Mich App ___, ___ (2006) (statements included references to VIP cards issued for admission into private area where illegal activities occurred and to financial benefits received from those illegal activities).